United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2347

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

1-10-75

Docket No. 74-2347

ARTHUR S. KURLAN, et al.,

Appellants,

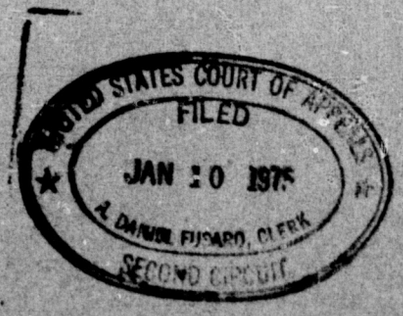
-against-

HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK and JOHN C. BAKER, COMMANDING GENERAL, NEW YORK ARMY NATIONAL GUARD,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

PETITION FOR REHEARING



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Appellants, aggrieved by that portion of this Court's decision of December 27, 1974, which affirmed the judgment of the District Court, petition for rehearing, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for the reason that in the opinion of petitioners the Court misapprehended the following issue:

> Whether those appellants who had applied for transfer to the Standby Reserve prior to July 10, 1974 (the date of Executive Order 8) but had not by then completed their

> fifth year of service in the New York Army National Guard are denied equal protection of the laws by virtue of the fact that other appellants in the instant case who were in the same status at the time of the call-up for active duty in March 1970 and had similarly applied for transfer to the Standby Reserve prior to July 10, 1974, will be granted such transfer as a result of this Court's judgment reversing in part the judgment of the District Court.

Thus, solely because of the selection by the Governor of New York of the July 10, 1974 date for his issuance of Executive Order 8, one group of appellants will have their Ready Reserve obligations reduced by one year, while the other group will remain subject to all of such obligations throughout their sixth year of service, as a result of this Court's decision. It is petitioners' contention that no rational basis exists for such a distinction among appellants in this case.

In upholding generally the validity of Executive Order 8, this Court found that a rational basis existed for distinguishing between Guardsmen who were with their units when the call-up of March 1970 took place and those, like appellants, who were on active duty for training at such time. The Court in its opinion noted that the basis for such a distinction was that Guardsmen who were physically with their units "apparently" suffered a serious disruption of their lives while those in appellants' position probably did not. Slip op. at 1103.

Unfortunately, that analysis does not speak to the issue raised in this petition. Rather, it only analyzes the distinction between all appellants as a class and those Guardsmen as a class who were with their units during the call-up. See Slip op. at 1104. However, the rationale applicable in that framework does not in any way answer the grave equal protection question with respect to appellants, who either suffered or did not suffer precisely the same hardship and disruption of their lives and who, consequently, are in the same class with one another, yet are receiving disparate treatment as a result of this decision.

The date of completion of five years of Ready Reserve service in no way alters the fact that each of the appellants was in the same status in March 1970 and each of them had requested transfer to the Standby Reserve prior to July 10, 1974. They thus are entitled to be treated on an equal basis and the Governor's Order should not be permitted to have the effect of cutting off the rights of one group of appellants solely because they did not complete five years of Ready Reserve duty as of July 10, 1974. The reasoning of United States ex rel Murray v. Owens, 465 F.2d 289, (2d Cir. 1972), cert. denied, 409 U.S. 1117 (1973), cited by this Court, does not in any way purport to justify different treatment for persons in the same class with respect to active duty status as in the case of appellants.

The only apparent basis for the position that appellants can be treated differently, notwithstanding their right to equal protection of the laws under the Fourteenth Amendment, is that the Governor was "free to change the manner in which he exercised his discretion ...." Slip op. at 1103. However, the freedom to modify one's acts does not permit a modification which will unfairly discriminate between members of the same class. Unless the Governor has a rational basis for discriminating among appellants, all of whom were on active duty for training at the time of the call-up, then his modification of the rights of certain appellants who had previously requested transfer to the Standby Reserve is impermissible. On the present record and under the rationale advanced by the Court in its opinion, it is submitted that no rational basis exists for the modification of the Governor's discretion as it affects appellants who had requested transfer prior to July 10, 1974, even if they had not yet reached their fifth year of service on that date.

Had the Governor amended Executive Order 39 prior to the qualification for transfer of any of the appellants, then the doctrine of Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 202-03 (1947), would be applicable. However, by waiting until some appellants had qualified and all had re-

quested transfer, the Governor could no longer justify disparate treatment based upon the "hardships" endured by those Guardsmen who were actually present at the time of the call-up and those who were on active duty for training, a justification which is basically irrelevant to the issue presented on this petition. There must be an independent justification sufficient to substantiate the distinction drawn between those appellants whose Ready Reserve obligations will be reduced by a year and those whose obligations will not be reduced, a "difference [which] ... is not insignificant". Slip op. at 1096.

Petitioners therefore request that reargument be granted on the limited issue of whether the Governor's Order of July 10, 1974, as interpreted by this Court and applied to the aggrieved appellants denied them equal protection of the laws in that other appellants in the same class with respect to their active duty status will be accorded transfer to the Standby Reserve. This issue, furthermore, is one upon which petitioners intend to proceed for review by writ of certiorari in the Supreme Court of the United States. Prior to petitioning for such review, and in light of the fact that this Court did not, in petitioners' opinion, rule directly on the

issue here presented, petitioners urge the Court to reconsider and make a specific ruling upon this issue.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF New York } SS.:

Selma Rauber

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 143 Langham St. Bklyn.

That on the 10 day of January 19 75

deponent served the within Petition for Rehearing

upon U.S. Attorney for Sthn Dist of N.Y. - Atty. Louis Larsen Esq at U.S. Courthouse Foley Sq. N.Y.

attorney(s) for Secy of Army; and N.Y. State Atty Gen's Office - Atty Robert Hazzard Esq at 2 World Trade Center N.Y.C. N.Y.

~~in this action, at~~ atty for Governor of N.Y. and Baker, N.Y.A.N.G.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within New York State.

Selma Rauber

Sworn to before me,
this 10 day of January 19 75

STEVEN J. HYMAN
Notary Public, State of New York
No. 30-7027835
Qualified in Nassau County
Commission Expires March 30, 1976